NOTES OF CASES.

Easements—Reservation of Right of Way to Burial Place.—In Clarke *v.* Keating (N. Y. Sup.), 170 N. Y. S. 187, it was held that a deed reserving to grantor s family a right of way to a private burial place for the purpose of burying their dead confers no right which could be sold or assigned to others than members of the family, that the removal of the bodies from such burial place left the land subject to sale or partition and that a sale under partition should not be subject to such easement.

The court said: "Caleb Purdy's will, probated in 1794, after devising a described lot, continued: 'Reserving at the same time a privilege to my family forever of going to and from a burying place in lot No. 3, through the same and burying their dead there if they incline so to do.' This burial place had been set apart in the testator's lifetime. Up to ten years ago about seventy interments had been made in this Purdy burying ground. They ceased in 1907. The last burial was of a child in an unnamed grave. Instead of leaving the bodies in this inclosure, which was becoming neglected and run down, the Purdy representatives consented that all bodies be removed to a new plot in the Greenwood Union Cemetery in Rye, where they have been reinterred. The court had therefore to inquire into the nature of any supposed burial rights in such a place where interments had ceased, and after the associations had passed with the removal of the bodies to a modern cemetery, with a system of care for graves and records of the bodies that may preserve identification after the weather-worn inscriptions have ceased to be legible.

"Giving this Purdy reservation its full meaning, it conferred collective, rather than individual and isolated, rights, like those of an ordinary grantee or licensee of a burial lot. Its intent was to provide a common burial place for the testator's lineal descendants, but not such a right as any could sell or assign to one outside of the family (Brown *v.* Anderson, 88 Ky. 577). Such contiguity in burial was not only a sentiment, but to aid records of kinship, pedigree and family history through such assembly of graves with adjacent memorials. After such purpose becomes ineffective by lawful removal of all the bodies, I think no member of the Purdy family retained any burial privilege or any appurtenant right of way to and from a place in which are no more family burials. In the testator's words, the family do not 'incline' to bury their dead there. It is not for failure to keep up the property or to care for the headstones or to cut the grass that the rights lapsed, but because by these disinterments the family have collectively abandoned this small family inclosure in favor of the conditions better and more lasting furnished

in a cemetery corporation. Defendant Irene Virginia Keating joins in asking that the land be sold free and clear of such burial rights.

"A holder of a deed of a cemetery lot, however strong may be the wording of the grant, even with a habendum using terms of inheritance, acquires only a privilege or license, exclusive of others, to make interments in the lot purchased, only so long as the lot remains a cemetery (11 C. J. 68; Buffalo City Cemetery *v.* City of Buffalo, 46 N. Y. 503; Went *v.* Methodist Protestant Church, 80 Hun 266; Coates *v.* Mayor, etc., of N. Y., 7 Cowen 585; Partridge *v.* First Independent Church of Baltimore, 39 Md. 631; Campbell *v.* City of Kansas, 102 Mo. 326, 10 L. R. A. 593). The abandonment of a cemetery does not follow from mere disuse and omitting to make new interments therein (Perley Mortuary Law, p. 199). But courts do regard the necessities and welfare of all the generations that are to follow (Rawson *v.* Inhabitants of School District No. 5 in Uxbridge, 7 Allen 125; Thornton *v.* Mayor, etc., of the City of Natchez, 129 Fed. Rep. 84; Page *v.* Symonds, 63 N. H. 17; Bitney *v.* Grim, 73 Ore. 257, 262).

"After removal of bodies the cemetery purpose has ceased. It is somewhat like the termination of the right of a pew owner, upon the destruction of the church, or the abandonment of such an edifice to secular uses (Richards *v.* Northwest Protestant Dutch Church, 32 Barb. 32). A lot owner in a cemetery with the rights of a purchaser for value has a title that is deemed subordinate to the general cemetery purposes. If such considerations restrict a purchased burial lot, much more should they apply to one whose right to bury comes from mere association with members of a family. Here the removal of the bodies undoes the character and association which the interments conferred, and leaves the land subject to sale or to legal partition, as after a general disinterment it loses its sacredness as a resting place for dead (Rayner *v.* Nugent, 60 Md. 515). In the classic judgment of Gilbert *v.* Buzzard (3 Phillimore Eccl. 335, 357), Sir William Scott said: 'Founded on these facts and considerations, the legal doctrine certainly is and remains unaffected, that the common cemetery is not res unius aetatis, the exclusive property of one generation now departed, but is likewise the common property of the living and of generations yet unborn, and subject only to temporary appropriation.'

"Even without precise precedent, land that has lost its sacred character should not be withheld from serving the needs of the community through a mere sentiment regarding a site in which the higher uses have ceased. The Roman law hallowed not only a cemetery, solum religiosum, but regarded a single lawful burial as a dedication of such a site to religious use. However, the strong practical sense of that civilization favoring extinguishment of rights by nonuser, held cemeteries and single burial places as reserved from trade

only while such burials remained. After disinterment and removal of the body or remains, the religious character of the ground ceased (desinit locus religiosus case, Dig. XI, tit. 7, § 44)."

Elections—Rights of Minority Candidate Where Majority Candidate Ineligible.—In Woll *v.* Jensen, 36 N. Dak. 250, 162 N. W. 403, Ann. Cas. 1918B, 982, it was held that a minority candidate for office has no right thereto because of the fact the candidate receiving the majority vote was ineligible to hold the office.

The court said in part: "The controlling question of the right of the plaintiff to the office remains and must be met. Specifically stated it is, whether one who has received less than the majority of the votes which are cast at an election is elected to such office so that he can claim the same when the voters knowing of the disqualification of his opponent chose to elect the latter by a majority of the votes cast. * * * The question before us has been the subject of no little discussion. It seems to be generally conceded that, where the voters do not know of the disqualification, the votes cast for the disqualified candidate cannot be credited to the defeated party, and that the whole election will be deemed a nullity. The only doubt in the minds of the writers has been whether this is true when the disqualification is known. The English rule and the rule of Indiana seems to be that where the disqualification is known the party receiving the minority vote will be entitled to the office, and this on the theory that the voters have willfully thrown away their votes, and that the office should not go begging on that account. The weight of American authority, both legislative and judicial, seems to be that no such intention to throw away the vote can be imputed, but that rather the vote for the disqualified candidate must be considered as a protest against the qualified person, and especially should this be the case where there are only two candidates. The authorities lay stress, indeed, upon the proposition that government by the majority seems to be an American maxim, and that no one should be deemed elected against the protest of that majority. It is true that many of the authorities are purely legislative. It is also true that perhaps in no adjudicated case has the question been fairly presented. The dicta of the courts, however, and the positive rulings of the legislative tribunals, are almost unanimous on the proposition that, where there is no statute declaring votes cast for ineligible candidates to be absolutely void, no right to the office can be presumed in the defeated candidate. We hold, therefore, that the plaintiff was not elected to the office."

Espionage Act—Inciting Insubordination, etc., in Military or Naval Forces.—United States *v.* Krafft (Cir. Ct. of Appeals, Third Circuit), 249 Fed. 919, was a prosecution under the provision of Act